IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946

No. 72

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE, INLAND WATERWAYS CORPORATION, THE SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF IN BEHALF OF APPELLEE, A. L. MECHLING, DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF A. L. MECHLING BARGE LINE.

EDWARD B. HAYES,
Attorney for Appellee.

BARNARD & MILLER, 135 S. MAYFAIR ST., CHICAGO, ILLINOIS 7-6842

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OPINIONS BELOW.

The specially constituted District Court wrote no opinion. Its findings of fact and conclusions of law (R. 177-207) have not been reported. The report of the Interstate Commerce Commission (R. 10-49) appears at 262 I.C.C. 7. It incorporates previous reports of the Commission, found respectively at 246 I.C.C. 353 and 248 I.C.C. 307.

JURISDICTION.

The final decree of the District Court was entered November 26, 1945. (R. 207-209) The petition for appeal was filed and allowed on January 24, 1946. (R. 209-210; 214-215) The Jurisdiction of the Court depends on Section 210 of the Judicial Code, 36 Stat. 1120, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U.S.C.A. 479), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U.S.C.A. 345). Probable jurisdiction was noted by this Court on April 29, 1946.

STATUTE INVOLVED.

Relevant provisions of the Interstate Commerce Act are shown in the Appendix hereof.

QUESTIONS PRESENTED.

For their service in taking grain east from Chicago, the eastern rails have for many years charged reshipping rates (lower than local rates) regardless of whether the grain came to Chicago by rail, by lake steamer, or by barge reaching Chicago via the Illinois Waterway.

By the order complained of the Commission prescribed that rail reshipping rates for transporting east from Chicago, any grain that shall have arrived in Chicago by barge, shall be higher than those charged on any grain that shall have arrived in Chicago by rail or lake steamer —uniformly higher by three cents a hundred pounds to all the most important eastern destinations, and by varying amounts to most of the less important destinations.

The specially constituted District Court enjoined the order.

Did the Commission err in prescribing such higher reshipping rates on all ex-barge grain than on any ex-rail or ex-lake grain?

Did the Commission, in so prescribing that said reshipping rates on all ex-barge grain shall be higher than the reshipping rates from Chicago on any ex-rail or ex-lake grain, misconstrue and misapply criteria and requirements of the Interstate Commerce Act, as amended by the Transportation Act of 1940?

Did the Commission, in so prescribing that rail reshipping rates east from Chicago shall be thus unfavorable to ex-barge traffic, and thus favorable to ex-rail and ex-lake traffic, make findings of fact that support its conclusion that such prescribed differences of rate treatment are lawful under Section 2, or Section 3(4), of the Interstate Commerce Act, as amended by the Transportation Act of 1940?

Did the Commission make findings of fact that rationally relate the record before it, under criteria for its action prescribed by the Interstate Commerce Act, to its conclusion that, the eastern railroads may lawfully exact such higher reshipping rates for transporting east from Chicago grain that shall have arrived there by barge, while exacting only such lower reshipping rates for transporting east from Chicago the grain that shall have arrived there by rail or by lake?

Did the Commission in so prescribing that the reshipping rates east from Chicago shall be thus unfavorable to ex-barge traffic, and favorable to ex-rail (and ex-lake) traffic, misconstrue, and apply a misconstruction of, the requirement of the National Transportation Policy that the inherent advantages of each form of transportation shall be recognized and preserved?

Did the Commission, in so prescribing that rail reshipping rates east from Chicago shall be thus unfavorable to ex-barge traffic, and thus favorable to ex-rail and ex-lake traffic, consider as warranting said result matters that do not warrant it, that the Commission had no right in law to consider to warrant it, and matters which afford no rational basis therefor?

If so, did the Commission, in acting on said idea, standard, or criterion of its own, (a) preserve the inherent low cost advantage of water transportation; (b) overhaul a judgment as to what is desirable that had been made by Congress, contrary to a statutory mandate enacted by the National Transportation Policy that was binding on the Commission in its administration of all sections of the Interstate Commerce Act; (c) attempt to "equalize" natural economic advantages, fortunes and opportunities?

SUMMARY OF ARGUMENT.

I.

By its order the Commission sought to equalize natural economic advantages, fortunes and opportunities which is beyond its jurisdiction.

The rates increased are those of the eastern railroads.

There is no finding that the present reshipping rates eastbound from Chicago are unreasonable.

The present barge rates into Chicago are expressly found to be reasonable.

There is no finding that the present combination rates —resulting from the sum of the present barge rates into Chicago and the present reshipping rates eastbound—are unreasonable.

It would have been the Commission's duty to order a change if any rates had been found unreasonable and it ordered none, but left the making of any change to the option of the eastern railroads.

There is no finding that any rate whatever was unreasonable as it existed before the order.

The Commission's findings show that farmers and river elevators so located as to be accessible to low cost water transportation have a natural advantage from location; that inland farmers not accessible to the waterway get for their crop what they would receive if there were no water transportation; but that elevators at rail locations in Illinois which cannot accumulate so much grain—because they cannot pay the farmer so much for his crop as the river elevator—are asking that rail rates be reduced.

The purpose of the present order is expressly stated to be to meet the desire of elevator operators at rail origins in Illinois.

The means adopted is to increase barge-rail combinations.

For a reduced differential between their all rail rates and water rail rates.

The purpose is to equalize the natural advantage of those having access to low cost transportation with the situation of those who do not.

The Interstate Commerce Commission was never given such power.

By the Transportation Act of 1940 the exercise of such power for the purpose involved was prohibited.

II.

The findings of the Commission do not support its order under the sections of the Interstate Commerce Act that forbid intercarrier rate discrimination.

The present report prescribes a discrimination. It is not predicated on the finding of the unreasonableness of any existing rate—whether the present reshipping rate of the eastern railroads, the incoming rates of the barge lines to Chicago, or the incoming rates of the western railroads to Chicago.

The present report is not predicated on a finding of the unreasonableness of any existing rate.

If a change were required to bring about reasonable rates the Commission would have required such change, but it required none.

The fact that the combination barge-rail rates resulting from the new reshipping rates eastbound from Chicago

may be reasonable is irrelevant to the fact that they are discriminatory.

The Interstate Commerce Commission by confession undertook to assimilate the applicable tests as to inter-carrier rate discrimination prescribed by Section 2 and Section 3(4) to the statutory tests of Section 3(1) which the Transportation Act of 1940 prohibited.

The findings of the Commission do not support its conclusion under Section 2 or Section 3(4).

Under the National Transportation Policy the Commission has a mandate to preserve the inherent advantages of all forms of water transportation.

The inherent advantage of water transportation is its low cost.

In exercising the asserted right to curtail the inherent low cost advantage of water transportation, the Commission resorted to standards which were forbidden, failed to make findings supporting its order under the applicable standards, and misinterpreted Section 6(b) of the Transportation Act of 1940 as only directing *it* not to require increases in established rail rates under the long-and-short haul clause, whereas Section 6(b) provides that the *long-and-short haul clause* shall not require changes in established rail rates and the Commission by permitting such a change because of the long-and-short haul clause has allowed the long-and-short haul clause to require the result reached.

STATEMENT.

The Established Rates and the Traffic.

Grain[1] comes to Chicago[2] by rail, by lake steamer, and by barge on the inland waterways.

After coming to Chicago this grain moves on east from Chicago by rail. (246 I.C.C. 353, 383-4; R. 48, 179.) Part of it goes east by lake during the seven months of open lake navigation. (Idem.)

The record shows in tabular form the quantities moving into and then out of Chicago, and the modes of transportation employed for the in-movement and the on-movement (246 I.C.C. 353, Appendix I; R. 47, 179) as to corn, wheat, oats and soybeans.

The rates in question are the rail rates for the movement of grain east from Chicago.[3] The established rail rates for the on-movement from Chicago include two general kinds of rates, "local" and "proportional." The *local* rates are in all cases *higher* than the proportional. These "proportional" or "reshipping rates" (lower than "local" rates) apply on grain that has been transported into Chicago. They apply to the on-movement east from Chicago.

The Chicago elevators receive this grain as it comes in by rail, by lake steamer, and by river barge. From the Chicago elevators it goes east. (R. 180)

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[1] "Grain" as used herein means the various kinds of grain, grain products and soy beans.

[2] Other reshipping points in the Chicago region are involved. Chicago dwarfs the rest and was treated by the Commission as fully representative. Chicago is one of the great grain reshipping points of the world. (246 I.C.C. on 383-4.)

[3] R. 36, 49, 184, 185.

By far the most important destinations for this grain lie east of Buffalo and Pittsburgh in what is called New England and Trunk Line Territory. (R. 18, 180, 181.)

For many years the reshipping rates from Chicago to New England and Trunk Line Territory have been the same, whether the grain arrived by rail, lake, or barge and regardless of origin.[4]

In order to engage the proportional (lower) rate level for movement east from Chicago, it is not required that the identical kernels of inbound grain be identified; the grain is all mingled in the elevators. It is required in order to engage the proportional rate for outbound shipment that the shipper shall show and surrender to a policing agency (called the Central Weighing and Inspection Bureau) inbound billing covering an equivalent amount of grain of the same kind that he is shipping east. This is true of grain that has come to Chicago by rail, barge or lake steamer.

The Proposed Change in Rates.

In this situation eastern railroads transporting grain east from Chicago proposed to change the established rail rates for the on-haul of grain that had been brought to Chicago. The nature of the change lay on the face of the schedules. It was stated by Commissioner Alldredge when the case was before Division 2 of the Commission:

> "If the suspended schedules should become effective the situation would then be that the present proportional rates would continue in effect on grain brought to Chicago by rail and by lake vessel, but the higher local rates would apply on grain brought in by barge over the Illinois waterways." (246 I.C.C. 353, 382; R. 18.)

[4] 262 I.C.C. 7, 12; R. 16, 191. For reshipping rates to the less important destinations intervening between Chicago and Buffalo, see Record 181, note 10.

This was also the finding of the Commission, which referred to

> "* * * the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates although in each instance the physical carriage beyond the reshipping point will be substantially the same." (248 I.C.C. 307, 311.)

Congress has spent millions in the improvement of our inland waterway system for navigation.[5]

On the Illinois River and Waterway alone, the investment of public money is about $60,000,000. (246 I.C.C. 353, 355.) River navigation for such cargo is by means of strings of barges moved by towboats. This elimination of navigation difficulties has made barge transportation of grain to Chicago commercially important. (Appendix 1 of the report of Division 2; 246 I.C.C. 353, 358.)

The barge rates into Chicago are lower than the rail rates. The result is that farm producers having access to river transportation get more for their grain.[6] One of the inherent advantages of water transport is low cost.[7] The benefit of low cost river transportation goes to the grain

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[5] These appropriations have been made over a period of years by Public Acts of Congress of which this court has judicial knowledge.

[6] The further he is from the river, the less the advantage to the farmer, as increasing distance is reflected in higher trucking cost to the river bank elevator. "The primary interest of the Illinois farmer having access to the waterway is the greater net price above referred to. The barge lines and the waterway elevator operators and dealers are primarily concerned with the volume of traffic moving through their facilities." (262 I. C. C. 7, 24; R. 186-187.)

[7] Cf. legislative history of the Transportation Act of 1940, hereinafter mentioned. The Inland Waterway Corporation was formed by Congress to develop low cost river transportation for the benefit of the public.

producer in the country. The Chicago buyer gets none of it. He pays the Chicago price, less the cost of getting the grain to Chicago, however it may come.[8]

The proposal was, as stated, to give, or withhold, the benefit of proportional rates going out of Chicago, depending on whether the grain comes in to Chicago by barge, or by rail.

The eastern lines who proposed this change in the established rate structure for the movement of grain east from Chicago put only one witness on the stand. (W. T. Tannehill.) He was cross-examined as to the reason why the railroads proposed the change in their rates, and left the subject here:

> "We made this proposal as I have stated several times, and filed these tariffs with the hope that we could drive this business off the water and back onto the rails where it belongs. * * *" (248 I.C.C. 307, 327; R. 195, N. 32.)

Upon petition of various parties the Commission exercised its powers under Section 15 of the Interstate Commerce Act and ordered a hearing on the proposed new rates.

Initially the case came before Division 2 consisting of three commissioners, two of whom joined in a report most of which is devoted to an argument to the effect that the established tariffs, properly construed, never had applied to ex-barge grain. The third commissioner dissented and found the proposed schedules to be unlawful. (246 I.C.C. 353.)

The eastern railroads who had made the rate proposal in question asked the full commission to reverse Division

[8] The present report spells this out. 262 I.C.C. 7, 16, 23; R. 16, 23, 186, 187.

2 with respect to the construction of their established schedules and the Commission did so.[9] But the Commission also denied the petitions of shippers and a barge line and held that the proposed schedules abolishing the application in the future of proportional rates to ex-barge grain (while continuing them as to ex-rail and ex-lake grain) "cannot be condemned as unlawful under Sections 2 and 3 of the Act." (248 I.C.C. 307, 311.)

The District Court enjoined the order, understanding it to mean (as the parties had)[10] that the Commission had approved the rail rates proposed. *Cargill, Inc.* v. *United States*, 44 F. Supp. 368 (N.D. Ill. E.D. 1942.) This Court held, however, that the Commission's dismissal of the suspension proceeding under Section 15, involved no approval of the rail rates proposed.

> "Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates, which, under the Commission's decision, leaves them open to possible recovery of reparations."
>
> *Interstate Commerce Commission* v. *Inland Waterways Corporation*, 319 U. S. 671.

The railroads did not put their proposal into effect. The Commission by order reopened the hearing for further evidence in the same record. (R. 57.)

The Commission held further hearings and found that certain ex-barge reshipping rates would be "*lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the eastern destinations considered herein*, under Sections 1, 2, 3(1), 3(4), 6(11)b and 15a(2) of the Interstate Commerce Act, administered with a view to carrying out the

[9] 248 I.C.C. 307, 309, 312 and following.

[10] Cf. Brief for the Commission, p. 4.

national transportation policy" etc., and stated what those "prescribed ex-barge proportionals" shall be. (R. 184, note.) (Our emphasis.)

The meaning of the Commission's action is stated in the District Court's finding 15 (R. 184):

> "To all Eastern Destinations[11] the prescribed reshipping rates on ex-barge grain are uniformly 3 cents higher than the reshipping basis on all ex-rail and ex-lake grain. To Central Territory[12] destinations, except in a relatively few instances, the prescribed reshipping rates on ex-barge grain are higher than the reshipping basis on ex-rail grain from the same origin, and higher than the reshipping basis on ex-lake grain from all origins."

The Commission found nothing unlawful in the long-established situation whereby the ex-barge grain is on a parity for rail transportation east from Chicago with ex-rail and ex-lake grain. It did not require the eastern railroads to change their rates in any way, nor to make effective the rates it had prescribed.[13]

There is, also, considerable discussion in the Commission's reports (on which were entered the said order giving the eastern railroads the right to increase the ex-barge rates, or not, as they saw fit) of the effect of the long-standing parity of reshipping rates on ex-barge, ex-rail and ex-lake grain, as breaking down or "jeopardizing"

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[11] Eastern Destinations—"New England and Trunk Line Territories, which include all territory east of a line drawn northward and southward through Pittsburgh, Pa., and Buffalo, N. Y. north of the Potomac River." (R. 180.) "In this proceeding, the rates to trunk-line and New England Territories are by far the more important, as marketers and processors in central territory can and do transit under such rates." (262 I.C.C. 7, 15; R. 18, 180.)

[12] Central Territory—"Chicago east to said Buffalo Pittsburgh line * * *." (R. 180.)

[13] Cf. *Columbia Broadcasting System* v. *United States*, 326 U. S. 432, 436.

the rail grain rate structure. The former expressions of the Commission on that subject are clear only when closely examined, and the present report elaborates what was meant by them. As to that:

The two commissioners who made the first report in this case[14] point out that, before the eastern rails proposed to increase the rates out of Chicago on ex-barge grain, the western rails who compete with the barge lines for the inbound haul to Chicago, have been publishing intrastate rates applying from some Illinois shipping points accessible to river transportation, which were lower than the interstate rates from the same points. The interstate rates from these water-competitive origin areas, for grain shipment to Chicago, were "said to be (*sic*) the normal basis reflecting the national grain rate structure." The report followed this statement with a table. The table shows those intrastate rail rates to Chicago, lower than the interstate rates. (246 I.C.C. 353, 356.)

The western railroads put in these low intrastate rates (with authority only of state regulatory bodies, which could not authorize transit in interstate commerce) to get the business away from the barge lines, or, in the language of the report, to meet barge line competition. But these low intrastate rates failed of their purpose. Division 2 said:

"*Position of the Western Rail Lines*:

"These lines maintain that the purpose of establishing the intrastate rates on corn, under which

[14] The third (Commissioner Alldredge), dissented, as did the late Joseph B. Eastman when the case reached the Commission. (246 I.C.C. 364; 248 I.C.C. 307.)

transit is prohibited, was to meet unregulated[15] barge competition.

"The practice of respondents[16] in permitting transit and the application of the proportional rates east of Chicago has had the effect of nullifying the western lines' efforts." (246 I.C.C. 353, 364.)

The purpose of the proposal of the eastern lines, which would have left only higher rates applicable on ex-barge grain, was, admittedly, to drive the inbound barge traffic "off the water and back onto the rails."[17]

The report referred later to the breaking down of the grain rate structure, as follows:

> "The western lines, supported by the eastern line respondents, also contend that if application of the proportional rates is to be continued on unregulated ex-barge traffic, the result will be a breaking down of the established through grain rate structure from west to east. The evidence already detailed *with respect to* the inability of the reduced intrastate rates on corn to accomplish their purpose in meeting the competitive barge charges supports this contention." (Our emphasis.) 246 I.C.C. 353, on 365.

When the report speaks of breaking down the grain rate structure by continuing the ex-barge reshipping rates, it here says that in terms of the actual evidence, the thing it is talking about is this behavior of the rails in publishing intrastate rates "said to be" below the interstate rail rate base in order to get the business away from the barge lines. The observation concerning the breaking down of

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[15] The barge carriers were unregulated when the eastern rails first proposed to increase the rates out of Chicago on ex-barge grain. When the report of Division 2 was written they were regulated carriers under Part III of the Interstate Commerce Act, enacted by the Transportation Act of 1940.

[16] The eastern rail lines, who made the proposal to increase the rates on ex-barge grain.

[17] R. 195; see 248 I.C.C. at 321.

the grain rate structure, understood in terms of the evidence and record as stated by the report, is this; that the rails have yielded to the temptation to publish low rail rates in their efforts to eliminate barge competition.

The only way suggested by which such temptation was to be removed from the rails was the way frankly stated by the eastern rails (who originally made the proposal to increase the ex-barge rates out of Chicago, and to whom the present order leaves the option to make its prescribed increased ex-barge rates out of Chicago effective) viz., to "drive the business off the water and back onto the rails." That phenomenon which the prior report called breaking down the (rail) grain rate structure would be eliminated —only to the extent that the barge lines were eliminated from the business.

In the present report the Commission explains what it meant by "the statement in the prior report that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure."

This explanation is found at 262 I.C.C. 7, 20; Record 191-192.

It begins by discussing the barge-rail "combinations" —that is, the sum of the low water rates into Chicago plus the established uniform reshipping rates east—which *combinations* are "generally far below the *local* [rail] rates from Chicago and also lower than the *local* [rail] rates from numerous intermediate origins in central territory, constituting numerous and extreme departures from the long-and-short haul provisions of Section 4," examples of what is meant being given. But the report makes very plain that its conclusions are not predicated, in the slightest degree, on the proposition that these "departures" from Section 4, are violations of any law. It says:

"Under Section 6(b) of the Transportation Act of 1940, respondents are not required to increase their present ex-barge proportionals to bring the barge-rail combinations in harmony with Section 4 principles. * * * Since Section 6(b) of the Transportation Act of 1940 protects the departures in the present adjustment it follows that it will protect any departures of lesser extent, such as those resulting from the rates approved herein." (262 I.C.C. 7, 30-31; Record 195, note 31.)[18]

What, then, is the consideration the Commission is putting forward and explaining in this discussion of breaking down the rail rate structure and Section 4 departures, that are, confessedly, protected by an Act of Congress, and that its prescribed rates do not eliminate anyway? The Commission's discussion of the subject proceeds:

"*The barge-rail rates are far below the all rail rates* from the same and other *Illinois* origins." *This* is an *inequitable situation* giving rise to *requests for reductions in the all-rail rates* from the Illinois and central territory origins, and it is difficult to see, with such extreme disparities, how *such* requests could properly be denied. As shown by Appendix R, Table I, there is a substantial production of corn in central territory. While *the farmers therein did not appear at the hearing to show that they were hurt by this situation;* such evidence was adduced by others *in the same relative position, namely,* the associations of private and farmer cooperative *elevator companies* at numerous *rail origins in Illinois.*"

[18] From its original enactment Section 4 has applied, only, to carriers and rates subject to the Act. (49 U.C.S.A. 4(1).) Prior to the Transportation Act of 1940 the barge rates were not subject to the Interstate Commerce Act, and therefore a barge-rail combination could not be resorted to in order to seek out a departure from Section 4. The 1940 Act, for the first time subjected barge rates to Section 4(1). (Transportation Act of 1940, Section 6(a) amending Section 4(1).) In so doing it specified in Section 4(1)b that this should not require any changes in established rail rates. (Transportation Act of 1940, Section 6(b) amending Section 4(1) of the Interstate Commerce Act.)

The report, as it tells us, did not allow the eastern railroads to increase their established ex-barge rates out of Chicago for the reason that the long-and-short haul clause of Section 4 made the existing rates unlawful. It recognizes that when Congress amended Section 4 of the Interstate Commerce Act by Section 6(a) of the Transportation Act of 1940 to bring water-rail rates, for the first time,[19] under the long-and-short haul clause of Section 4, it also, by Section 6(b) of the same amendment, inhibited this application of the long-and-short haul concept to water rates to require a change in established rail rates. A change in established rail rates is just the result the Commission arrived at. Its view is, that it has observed the mandate of that statute, because its order did not require the eastern railroads to increase their established ex-barge rates, but only permitted them to do so, as they had long wished to do for purposes they did not seek to conceal.[20] The stated basis of its action is that there is "an inequitable situation," namely, that "The barge-rail rates are far below the all-rail rates from the same and other Illinois origins." Further, that "elevator companies at rail origins in Illinois" are in "the same relative position" as farmers in Central Territory (east of Chicago). Then those equities, that move the Commission to action, are not long-and-short haul clause equities. The long and-short haul clause applies only to hauls "over the same line or route." A barge-rail route is not an all-rail route. The "requests for reductions in the all-rail rates" are urged only by "elevator companies at numerous rail origins in Illinois."

The Commission then says:

"This is what is meant by the statement in the prior

[19] When, as the Commission has found to be the case here, there is no "through route or common arrangement."

[20] 248 I.C.C. 307, 327; R. 195, N. 32.

report that the present ex-barge proportionals from Chicago jeopardize the all-rail rate structure."

Jeopardy to the all-rail rate structure when stated by the earlier report in terms of the evidence, consisted of reductions in rail rates made by the western railroads to get the business away from the barge lines. That means the same, under the explanation now given, as recognizing requests urged by "elevator companies at numerous rail origins in Illinois" to have their rail rates on the all-rail route reduced. "So far as the rail carriers are concerned, the grain originates at numerous so-called country elevators . . ."[21] in the business of accumulating grain, whose geographical location on the higher rated all-rail route prevents them from accumulating so much grain, because they cannot pay the farm producer so much for his crop as the river elevators that use low-cost water transportation.

"The primary interest of the Illinois farmer is in the greater net price above referred to." (262 I.C.C. 7, 24, R. 187.)

Dealing, in its former report, with the prospective consequences of the 8½ cent rate disadvantage then proposed against ex-barge grain seeking rail reshipment east from Chicago, the Commission said:

"The proposed schedules will not prohibit the movement of barge-rail grain even to trunk-line territory, their principal commercial effect being to reduce the profits of certain Chicago elevator operators." (248 I.C.C. 307, 310.)[22]

That prediction is now expressly withdrawn.[23]

[21] 262 I.C.C. 7, 15; R. 20.

[22] There was dissent, including a careful opinion by the late Joseph B. Eastman. (248 I.C.C. 307, 312)

[23] 262 I.C.C. 7, 25; R. 29.

The finding now is, further, that the elevator charges and dealer's margin at Chicago are the same on ex-rail and ex-barge grain.

> "The elevator charges and dealer's margin at Chicago are the same as on transit rail grain, namely, 1.6 and 2.25 cents, respectively." (262 I.C.C. 7, 23; R. 187.)

(No finding is made as to what *profits* are made out of such charges, or such margin.)

The present finding is, further:

> "The proportionals from Chicago [the reshipping rates here in question] being substantially the same[24] as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billings and to utilize such grain in their hedging operations. The net price to the Illinois farmer selling his grain for transportation by barge to the Chicago market is determined by the Chicago price, less the barge rate and the applicable costs and margins peculiar to the barge traffic." (262 I.C.C. 7, 23; R. 27.)[25]

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[24] They are exactly the same, on ex-barge, ex-rail and ex-lake grain, to all New England and trunk line destinations, as the Commission elsewhere finds, regardless of origin. (R. 16). These are "by far" the more important. (R. 18, 180)

[25] And further:

> "The primary interest of the Illinois farmer having access to the waterway is in the greater net price above referred to. The barge lines and the waterway elevator operators are primarily concerned with the volume of traffic moving through their facilities." (262 I.C.C. 7, 24; R. 27).

Compare Eastman, dissenting from the former report:

> "While it is true, to some extent, that the combination of the barge rate to Chicago plus the local rate eastbound is lower than the combination of the rail rate from the same origin point to Chicago plus the reshipping rate eastbound, this fact will not enable the ex-barge grain to move from Chicago on the local rate, because the benefit of the low barge rate now goes to the farmer and cannot be used by the elevator operator to offset the higher level of the local rates as compared with the reshipping rates." (248 I.C.C. 307, 321.)

Thus the Commission finds that price parity on the Chicago market of ex-barge, ex-rail and ex-lake grain, is the direct consequence of parity in the reshipping rates east from Chicago on each.

The Commission's present prediction as to the effect of the 3 cent reshipping rate disadvantage it prescribes for ex-barge grain eastbound by rail from Chicago, is this:

> "Under the proportionals approved herein on the ex-barge traffic, it may be necessary to accord grain backed by barge billing some discount under the Chicago price, *but certainly there is no reason why such discount should be as great as the increase resulting from such proportionals.*" (Our emphasis.) (262 I.C.C. 7, 29; R. 33, 186-189.) [26]

The farmer, who gets "the Chicago price less the barge rate and applicable costs and margins applicable to such traffic",[27] has less to gain by taking his grain to the river for shipment to Chicago by barge, when the Chicago price on his grain is discounted by anything up to 3 cents because he chose barge transportation instead of rail transportation. To afford him the same incentive the barge lines would have to cut their own rates—expressly found to be reasonable rates.

There is no finding (and no contention) that anything less than 3 cents is *de minimis* in the grain traffic. It is no longer supposed (*ubi supra*) that the Chicago elevator operator will stand the cost of maintaining price parity for ex-barge grain in Chicago (as compared with ex-rail and ex-lake grain) in the face of an unfavorable rate differential of even 3 cents for its reshipment to the east.

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[26] R. 188.

[27] "The barge rates yield fair returns to the carriers and for the purposes of this report may be accepted as reasonable." 262 I.C.C. 7, 19; R. 23.

If it were lawful (as we deny) to force the barge lines to stand it, out of rates expressly found by this report to be fair and reasonable,[28] it is obvious on the face of the report that they could not. The *whole rate* by barge to Chicago, from a third of the origins selected by the present report, was not "so great" as 3 cents.[29] If the barge lines cut rates from these origins by ½ cent (to offset even a ½ cent discount in the Chicago market price of ex-barge grain, resulting from the prescribed reshipping rates east from Chicago) they would be cutting them by a heavy percentage. There is no finding that this carrier would receive a non-confiscatory return, or could stay in the traffic, with such a cut in its rates (rates expressly found to be fair and reasonable as they stand).

On brief, the Commission seeks to put us in the position of claiming that the barge lines are "entitled" to the business.[30] We suppose that as between the barge lines and the western railroads, competing with each other for grain traffic into Chicago from limited rail-and-water competitive origin areas (areas that are limited by the fact that the rivers do not go everywhere, as the railroads do) each is entitled not to be discriminated against in the reshipping rates on its traffic out of Chicago.

The Commission's brief (like its report) is devoted to discussion of the reasonableness of the overall "combination" charge resulting when one adds the low inbound barge rate, to the higher outbound rail rate, now prescribed. As to that, there is no argument that the Commission is unable to fix reasonable rates that are also non-discriminatory. The duty to see that the overall rates

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[28] See note 27.

[29] 262 I.C.C. 7, 40; R. 46.

[30] Cf. Brief for the Commission, p. 34.

are reasonable is not the whole duty of the Commission. It describes what it did:

> "On further hearing:
> * * * * *
> "2. We further find that reasonable and otherwise lawful proportional rates for the interstate transportation by rail of ex-barge grain, in carloads, from Chicago, Ill., to the eastern destinations considered herein, * * * will be those * * * which are no *less favorable to the ex-barge traffic* and no *more favorable to the ex-rail and ex-lake traffic* than is represented by" etc., etc. (R. 36, 184 and note.)

It is those rates that, under the formula then set forth, are admittedly, prescribed 3 cents higher on ex-barge grain to the most important eastern destinations, than on any ex-rail or ex-lake grain whatever.[31]

The Commission prescribed continued reshipping rate parity from Chicago to all New England Trunk Line destinations as to ex-lake wheat (from the Dakotas) and ex-rail corn (from Illinois). These were described in the opinion in the former case as widely disparate factual situations.[32]

The Commission destroyed reshipping rate parity from Chicago to all New England and trunk line destinations as to ex-rail corn from Illinois, and ex-barge corn from Illinois.[32a]

Findings of the Commission are:

> "In this proceeding the rates to Trunk-line and New

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[31] *Atchison, T. & S. F. Ry. Co.*, 279 U. S. 768, 771, 776.

[32] Cf. the quotation in the report (262 I.C.C. 7, 31) from the opinion in the former case (*Interstate Commerce Commission* v. *United States*, 319 U. S. 671, 688) wherein it was held that the Commission was not bound to treat as identical "such widely disparate factual situations."

[32a] This Appellee brings many kinds of grain to Chicago, corn predominating, from Illinois origins. (250 I.C.C. 77; R. 4.)

England territories are by far the more important, as marketers and processers in central territory can and do transit under such rates."

(262 I.C.C. 7, 15; R. 18.)

• • •

"To trunk-line and New England territories the proportionals from Chicago and other gateways are uniform regardless of origin."

(262 I.C.C. 7, 12; R. 16.)

• • •

"The all-rail adjustment by providing for proportionals on out-bound balances from the gateways, fixed so far as practicable at a uniform figure regardless of origin, gives the merchants and processors at such points the benefits of transit and at the same time assists them in maintaining a common price, thus facilitating hedging and other market operations."

(262 I.C.C. 7, 17; R. 21.)

• • •

"The proportionals from Chicago being substantially the same as on ex-rail and ex-lake grain, the Chicago dealers are able to maintain the Chicago price without discount on grain backed by barge billings and to utilize such grain in their hedging operations."

(262 I.C.C. 7, 23; R. 27, 189.)

• • •

As to ex-lake grain:

"Even this small volume is attracted to Chicago under its present ex-lake proportionals only because dealers there can use grain backed by lake billing without discount in their marketing and hedging operations, and as such proportionals apply to and through points in central territory, dealers and processors may ship their grain or products at the out-bound balance of the proportionals to trunk line and New England territories."

(262 I.C.C. 7, 18; R. 22.)

• • •

"Lake-rail grain from the Northwest does not have to move via Chicago."

(262 I.C.C. 7, 18; R. 22.)

• • •

"As to the ex-lake rates from Chicago, that these do not adversely affect those interested in the barge-rail traffic via Chicago is shown by the fact that if such ex-lake rates were increased, *lake* grain from the northwest would continue to flow to the Lake Erie and Hudson River *ports* and those interested in the barge-rail traffic via Chicago would be no better off than before."

(262 I.C.C. 7, 29; R. 33.)

• • •

When the former case was here (*Inland Waterways Corporation* v. *U. S.*, 319 U.S. 671) the denial of appellee's attempt to appear before the Commission (319 U.S. on 682) had left him in the position of merely objecting to the proposal of the eastern railroads (319 U.S. on 687), a proposal whose own shortcomings were then defended by its advocates chiefly on a peculiarity of existing reshipping rates to *Central* Territory.[33] (319 U.S. on 674-675.) The case had been developed before the Commission upon the proposition that the rates proposed by the eastern railroads must stand or fall in their entirety. (319 U.S. on 687.) Appellee's petition to reopen the hearing asked the Commission to exercise all its powers. (R. 54.) This and similar petitions of others were granted by the Commission, the petitions being treated as complaints. (R. 56.) Reference is made to the opinion of Commissioners Alldredge and Lee, at the conclusion of the reopened hearing. (262 I.C.C. 7, 34; R. 38-40.)

[33] Also sometimes called "Central Freight Association Territory," or "C.F.A.," as at R. 40.

Appellee A. L. Mechling, Doing Business Under the Trade Name and Style of A. L. Mechling Barge Line.

Appellee is in the business of bringing various kinds of grain and soy beans to Chicago by barge via the Illinois Waterway from points on the Mississippi River between and including New Madrid, Missouri, and Burlington, Iowa, and also from intermediate origins including Illinois origins.

In collateral proceedings appellee has been issued a certificate of public convenience and necessity to operate as a common carrier of all kinds of grain and soy beans and is a common carrier by water subject to Part III of the Interstate Commerce Act. *A. L. Mechling Common Carrier Application*, 250 I.C.C. 77. (R. 14,) This certificate was issued under the "grandfather clause" of the Transportation Act of 1940, providing in substance that operation prior to January 1, 1940, was conclusive that appellee's operations served public convenience and necessity. (309(a).) Appellee's certificate as a common carrier subject to Part III of the Interstate Commerce Act was later extended on a finding of public convenience and necessity, to include such Trans-Mississippi origins, as St. Louis, Missouri, and Burlington, Iowa. *A. L. Mechling Common Carrier Application*, 250 I.C.C. 205. (R. 14.)

Grain arriving by barge in Chicago is marketed but not processed there. (R. 26, 180.) The railroads maintain switching rates from the river receiving elevators at Chicago to the Chicago processors ranging from 3.25 to 4.05 cents per hundred pounds. (R. 27, 180.)

If grain is to come to Chicago by barge it must find escape to the east.

ARGUMENT.

I.

By Its Order the Commission Sought to Equalize Natural Economic Advantages, Fortunes and Opportunities Which Is Beyond Its Jurisdiction.

The rates increased are those of the eastern railroads. There is no finding that the eastern railroads are in need of additional revenues nor that the present reshipping rates eastbound from Chicago are unreasonable. The barge rates into Chicago are expressly found to be reasonable. There is no finding that the present combination rates—resulting from the sum of the present barge rates into Chicago and the present reshipping rates eastbound—are unreasonable. The Commission ordered no change, as would have been its duty had they been found unreasonable, but left the making of any change to the option of the eastern railroads.

There was in the Commission's order prescribing a rate disadvantage on ex-barge grain seeking rail reshipment eastbound from Chicago, the thought and purpose that thereby it would reduce natural economic advantage and opportunity accruing to those who have, through their geographic location, access to low-cost barge transportation into Chicago—in order somewhat to equalize that advantageous and fortunate economic situation with that of others, whose geographic location is, in that respect, less advantageous.

There seems to be no other way to read the passage (R. 24) describing the fact that barge-rail rates are far

below the all-rail rates from the same and other Illinois origins and declaring this to be an inequitable situation, particularly in view of the further assertion there made that, in respect of the equities so arising, elevators at rail origins in Illinois are in the same relative situation as farmers in Central Territory—who make no complaints for themselves. This is stated to be the meaning both of jeopardy to the all-rail rate structure and of long-and-short haul clause equities (R. 24) and under one or both forms it appears again and again in the reports on the case.

The concession of the report that the rate disadvantage which it prescribes on ex-barge grain is such that it may be necessary to accord ex-barge grain some discount under the Chicago price—but not a discount as great as the increases resulting from the prescribed proportionals —should be sufficient to show that the Commission at least anticipates that its order will have the effect referred to. (R. 33.) Indeed, its extensive findings showing that price parity on the Chicago market is conditioned on rail rate parity eastbound from Chicago to the more important destinations, seem to leave room for no other rational conclusion. None other is stated.

We submit that the vice which has led courts to condemn the attempt to equalize fortunes and opportunities by rate adjustments appears in this order in a high degree. The findings of the Commission demonstrate that the Illinois farmer receives for his crop the Chicago market price, less the cost of getting the crop to Chicago; that when it goes by rail the deduction from the price received by the farmer is the cost of rail transportation and its incidental services, whereas when it goes by barge there is deducted only the lower cost of

barge transportation and its incidental services. (R. 26-27, 186-188.) Under such circumstances the farmer whose location confines him to all-rail transportation into Chicago receives just what he would get if there were no waterway. But elevators at rail locations in Illinois will be able to accumulate less grain because they cannot pay the farmer so much for his crop. Their disadvantage arises from their location on the rail lines and the attempt to equalize their situation with that of the more advantageously located elevator on the river accomplishes that equalization by *pro tanto* destroying a natural economic advantage (which is also a natural resource). That cannot be contended to be within the scope of the intent of the Interstate Commerce Act in conferring powers upon the Interstate Commerce Commission under any section thereof. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46; *So. Pacific* v. *Interstate Commerce Commission*, 219 U.S. 433, 441, 449; *Ashland Fire Brick Case*, 22 I.C.C. 115, 121; *United States* v. *Chicago M. & St. P. R. Co.*, 294 U.S. 499, 507.

Since the natural fortune and opportunity concerned is accessibility to low cost water transportation, the attempt to equalize it with that of others less fortunately situated in that respect, would seem not only to fall outside any powers ever given the Commission but to be—since the Transportation Act of 1940—affirmatively prohibited.

II.

The Findings of the Commission Do Not Support Its Order Under the Sections of the Interstate Commerce Act that Forbid Intercarrier Rate Discrimination.

The Commission has prescribed a rate discrimination that is against the barge lines and their traffic in favor of the rail (and lake) lines and their traffic. The rates prescribed are rail rates for the on-haul from Chicago; they are prescribed to be higher on all ex-barge grain and lower on all ex-rail (and ex-lake) grain.

Its report is not based on any finding that the present "through barge-rail" rates are unreasonable. If they were outside the zone of reasonableness, in either direction, it would have been the Commission's duty to require a change, and it does not, but leaves any change to the option of the easter railroads. Imperative mandates of the Act required the Commission to fix the rates which it did fix—eastbound from Chicago—so that they did not discriminate between connecting carriers, including these common carriers by water (Section 3(4)) and so that no higher charge would be demanded for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." (Section 2.)

That a rate is reasonable (under Section 1) does not control the answer to the question whether it is discriminatory (Section 3(4)) or unjustly discriminatory (Section 2).

Interstate Commerce Commission v. *B. & O. R. R. Co.*, 145 U.S. 263, 277.

American Express Co. v. *So. Dakota ex rel. etc.*, 244 U.S. 617, 624.

U. S. v. *I. C. R. R. Co.*, 263 U.S. 515, 524.

Inland Waterways Corp. v. *U. S.*, 319 U.S. 671.

The Transportation Act of 1940 amended Section 3(1) of the Interstate Commerce Act so as to prohibit applying the latitudinarian tests of undue prejudice against persons and localities "to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description."[1]

In 1915 the Interstate Commerce Commission applied Section 2 of the Act in the leading case of *Chattanooga Packet Co.* v. *I. C. R. R. Co.*, 33 I.C.C. 384 (by the entire Commission) to a situation in which a defendant rail line undertook to restrict its proportional rates against ex-water traffic. The Commission said (p. 392):

> "The fact that the proportional rates to and from the Ohio River are compelled by competition can have no bearing upon our determination of the issue of unjust discrimination. The 'like circumstances and conditions' referred to in Section 2 of the act are those which arise within the field of haulage, and do not include competition. *Wight* v. *U. S.*, 167 U.S. 512; *I.C.C.* v. *A.M.R.R. Co.*, 168 U.S. 144. The shippers who desire to avail themselves of the water-and-rail route must be given equal treatment with those who ship all-rail. Any discrimination which exists must not exceed that which is warranted by the differences in circumstances and conditions *of the haul over defendant's lines.*"

Further (p. 393):

> "We are of the opinion and find that, by restricting their proportional rates to traffic routed over their southern rail connections, defendants are unjustly discriminating against complainant and against shippers who desire to route their goods over complainant's boat line."

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[1] The Transportation Act of 1940, Section 5(a)(1); 54 Stat. 902, amending Section 3(1) of the Interstate Commerce Act; 41 Stat. 479, see 24 Stat. 380; 49 U.S.C.A. 31, 49 U.S.C.A. 31 (Supplement).

See *accord*:

Raw Sugar, New Orleans to Gramercy and Reserve La. (1935), 206 I.C.C. 231.

Bascom Co. v. *A. T. & S. F. Ry. Co.*, 17 I.C.C. 354.

Rosenbaum Bros. v. *L. & N. R. R. Co.*, 22 I.C.C. 62.

Birkett Mills v. *D. L. & W. R. R. Co.*, 123 I.C.C. 63.

Ex-River Grain and Products to Mississippi Valley, 177 I.C.C. 206.

Restriction of Proportional Rates, 161 I.C.C. 113.

The decision of this court cited by the Commission in the opinion above quoted is *Wight* v. *U. S.*, 167 U.S. 512, 518. Other cases are *I.C.C.* v. *Delaware L. & W. R. Co.*, 220 U.S. 235, 253-4 (where the court stated the principle in much broader terms than necessary to condemn the present rate proposal); *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 279 U.S. 768. Cf. *T. & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197.

Before the Transportation Act of 1940 was adopted (September 18, 1940), Division 3 of the Interstate Commerce Commission, without reference to these previous decisions had apparently overruled them in *Ex-River Grain from St. Louis to the South*, 203 I.C.C. 385 (1934).

After extensive debate[2] Congress adopted the Transportation Act of 1940, thereby placing water carriers under the jurisdiction of the Commission, and at the same time (among other things) amending Section 3(1) of the Interstate Commerce Act. This amendment was effected by 5(a) of the Transportation Act of 1940. It added to Section 3(1) a concluding proviso; The amendatory act read:

"Sec. 5. (a) Paragraph (1) of section 3 of the

[2]Summarized in *I. C. C.* v. *Inland Waterways Corp.*, 319 I.C.C. 671, 698 and following.

Interstate Commerce Act, as amended (which prohibits the giving of undue or unreasonable preferences or advantages by carriers subject to part I), is amended to read as follows:

"'(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

(54 Stat. 902; 49 U.S.C.A. 3, Supplement).

The Transportation Act of 1940 by Section 5(e) thereof likewise amended what had been Section 3(3) of the Interstate Commerce Act, adding a new sentence at the end thereof. The amendatory act read:

"(e) Paragraph (3) of such section 3 (which relates to the affording of facilities for interchange of traffic), is amended by striking out '(3)' and substituting in lieu thereof '(4)' and is further amended to read as follows:

"'(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fare, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term

"connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III.' ":

(54 Stat. 902; 49 U.S.C.A. 364, Supplement).

The rates prescribed by the Commission raise the issue of rate discrimination against the connecting barge lines and their traffic. It is essential that its findings should support its result under the statutory criteria governing that situation. The Commission's report discloses, and its brief here confesses, that it approached its problem as though the foregoing amendments to Section 3 had not been made; that it looked at the record before it to see whether particular ex-barge rates eastbound from Chicago would result in a reasonable "through barge-rail" rate when combined with the inbound barge rates (Section 1) and then to see whether the rates so resulting occasioned anything that in its judgment constituted undue prejudice (Section 3(1)). It says on Brief (p. 20):

"The discrimination forbidden by section 3(4) partakes of the same quality as discrimination and *undue prejudice* against persons and localities. Equality of treatment under this section must be determined by similarity of circumstances and conditions. Whether or not there are differentiating circumstances which warrant different rate treatment is the exclusive administrative function of the Commission. This issue the Commission settled affirmatively by specific and categorical findings as to what those differences were as between the *through* all-rail service and the *through* barge-rail service.

And, at Brief 50-51:

"Throughout its report the Commission was careful to stress the fact that it was treating of a *through* barge-rail transportation service and that its one concern was to establish a reasonable and nondiscriminatory charge for *that* service." (Our emphasis.)

In order to bridge the gap between Section 3(1) and Section 2 and Section 3(4), the Commission's Brief depends on *Pennsylvania Co. v. United States*, 236 U.S. 351, 361. (Brief 48, 49.)

The case referred to was one in which this Court, affirming the District Court, refused to enjoin an order of the Commission; the Commission's order was one which compelled the Pennsylvania Railroad to give a connecting railroad switching facilities, that it was giving to other connecting railroads. That decision was correct; obviously it does not support the proposition for which the Commission cites it.

The first paragraph of Section 3 of the earlier Act read, as quoted in that opinion:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Idem.)

In the course of the opinion, this Court, commenting on Section 3 of that Act, said:

> "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is *such undue preference or advantage* is a question not of law but of fact." (Idem.). (Our emphasis.)

When the present case was decided Section 3(1) of the Interstate Commerce Act, as amended, read similarly, except that Congress had added this sentence by the Transportation Act of 1940:

> "Provided, however, that *this paragraph* shall not

be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (Our emphasis.) (Section 3(1), 49 U.S.C.A.3(1).)

It is not upon Section 3(1) that we rely. This Court in the cited case paraphrased provisions of the first paragraph of the earlier act in saying that they presented questions of fact and not of law. And Congress later amended that language of that paragraph to say that the provisions of that paragraph did not apply to discrimination against the traffic of any other carrier. This was done as part of the general revision of the Interstate Commerce Act effected by The Transportation Act of 1940. At the same time Congress put Section 3(4) in the form in which we rely upon it; Section 3(4) as amended and not Section 3(1) applies here.

The provisions of other paragraphs of the earlier act (quoted in the opinion) dealing with inter-carrier discrimination as to rates, fares and charges, were not even involved in the cited case. The court said:

> "And, as we have said, the question of compensation is not here involved, and what compensation the Pennsylvania Company might require from the Rochester Company is not now to be determined." (Idem.)

The Transportation Act of 1940 added the last sentence to Section 3(4):

> "As used in this paragraph the term 'connecting line' means the connecting line of any carrier by water subject to the provisions of this part *or any common carrier by water subject to the provisions of Part III.*"

(Our emphasis.) (49 U.S.C.A. 3 Supplement; 49 Stat. 607c, 722, Title I, Sec. 5(a).)[1]

The Commission sets forth the "circumstances and conditions" (R. 195) upon which it relies as differentiating ex-barge grain from ex-rail and ex-lake grain. On Brief, it described the legal standard it applied and how it applied it. (Brief 20, 48.)

As the application of the decision of this court made in *Chattanooga Packet Co.* v. *I.C.R.R. Co.*, 33 I.C.C. 384, *supra*, discloses, Section 2 cannot properly be applied to the situation presented merely on a consideration of reasonable rates for the through "barge-rail" service. There is no question as to the reasonableness of the inbound rates of the barge lines which are expressly found to be fair and reasonable. There is equally no question of the reasonableness of the established outbound proportional rates of the eastern railroads. Had they not fallen within the zone of reasonable-

[1] This section is in Part I. Appellee is a common carrier subject to Part III. He has been certificated as such by the Commission in collateral proceedings as above pointed out, and as recognized in the report. (262 I.C.C. 7, 23; R. 11.)

A footnote to the Brief for the Commission states that the Commission held that the "port-to-port rates on bulk grain over the Mechling Barge Line were not subject to its jurisdiction. Sec. 303(b) (R. 23.))" This, unless amplified, might suggest that the Commission had held Mechling not to be a common carrier subject to Part III, and disentitled to its protection. The direct contrary is true. (*Ubi supra.*)

Section 3(4), here relied on, is in Part I of the Act. Section 303(b) is in Part III, and does not exempt any "carrier." The "transportation" which it exempts is not "bulk grain." (Cf. Brief for the Commission, p. 33, note.) It exempts "transportation by water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities." (303(b).)

ness, the Commission's duty would have been to require a change and it required none, but left the making of any change to the option of the eastern railroads. The question was discrimination against the connecting barge lines and their traffic, and to treat that question as governed by a statutory test partaking of the "same quality" as undue prejudice against persons and localities was to neglect the 1940 amendment of Section 3(1) which prohibits the application of such criteria to "discrimination, prejudice or disadvantage to the traffic of any other carrier *of whatever description.*" This amendment to the Act at the time when water carriers were first brought within its scope and the emphatic concluding words of the amendment forbade any approximation of Section 3(1) standards as a measure of the meaning of Section 3(4).

The prohibition of Section 3(4) is found in Part I and it is unqualifiedly that carriers subject to Part I which include rail carriers "shall not discriminate in their rates, fares and charges between connecting lines." The amendment included in that protection the lines of water carriers subject to part III. (Section 3(4).)

We contend that the Commission misapplied Section 3(4) by applying its unqualified prohibition of rate discrimination between connecting carriers as "partaking of the nature" of statutory criteria found in Section 3(1) which are addressed to different situations and whose application in any degree to warrant the inter-carrier rate discrimination prescribed by the Commission's order, was contrary to the intent and meaning of the Transportation Act of 1940, especially the proviso added by that amendatory legislation to Section 3(1).

We contend also that the Commission misapplied Section 2, that fixes specific criteria of rate discrimination, by applying the definite criteria of that section as "par-

taking of the nature" of statutory criteria found in Section 3(1), and whose application in any degree to warrant the inter-carrier rate discrimination prescribed by the Commission was contrary to the intent and meaning of the Transportation Act of 1940, especially the proviso added by that amendatory legislation to Section 3(1).

The Commission cannot "average" the standards of the Act, especially not an applicable standard with another whose application to warrant the situation that it prescribes is expressly forbidden.

When it appears as from this report that the administrator adopted the wrong criteria of action, as to which the Commission's Brief pleads it guilty, then it becomes immaterial what findings it may have made. What the administrator would have done in any case if he had adopted other and correct criteria, the court will not undertake to say; that is the administrative function. Accordingly, the findings of the Commission do not support its order for the reason that they were not applied according to the statutory criteria governing the situation presented.

We contend that the findings upon which the Commission relied do not support its conclusion under Section 2 or Section 3(4) of the Act.

It will be apparent that we are not contending that the Commission should establish any particular rates, perpetuate any specific rate scale, or refrain from readjusting the rate situation. We contend that it did not act on the statutory criteria applicable to the situation before it; that the order must fall for want of findings of fact made on substantial evidence that support the result reached

under the applicable criteria;[3] because the commission took into the accounting matters which the Commission could not lawfully permit to influence its judgment upon that situation and under those criteria,[4] and disclose no rational relation between the findings and the result when tested by the applicable criteria.[5] We contend that the findings do not support the order in any of those respects. We contend that the findings do not support the order under either Section 2 or Section 3(4) of the Act.

Moreover, it does not appear from any finding in the report that either the fact or the degree of discrimination described would have been arrived at by the Commission if any of the circumstances and conditions put forward for its justification were left out of the account. This Court will not presume that the discrimination, in fact or amount, would have been arrived at if any of its avowed bases were removed. For this Court to justify the discrimination on less ground than the administrator accepted, would be for this Court to attempt the administrative function.

If the unqualified prohibition of Section 3(4) as amended by the Transportation Act of 1940 against rate "discrimination" between connecting lines is applied according to its terms, as we think it should be then it condemns the order, because the Commission attempted to justify what Congress forbade.

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[3] *Florida* v. *U. S.*, 282 U.S. 194, 215.
U. S. v. *B. & O. R. Co.*, 293 U.S. 454, 464.
U. S. v. *Chicago, M. & St. P. R. Co.*, 294 U.S. 499.

[4] *Mitchell* v. *U. S.*, 313 U.S. 80.
Interstate Commerce Commission v. *Diffenbaugh*, 222 U.S. 242.
Interstate Commerce Commission v. *Stickney*, 215 U.S. 98.
Ann Arbor R. Co. v. *U. S.*, 281 U.S. 658, 666.
Anchor Coal Co. v. *U. S.*, 25 F. (2d) 462, 471.

[5] *Rochester Tel. Co.* v. *U. S.*, 307 U.S. 125, 146.

Certainly the "discrimination" forbidden by Section 3(4) cannot "partake of the nature of the standards of undue prejudice found in Section 3(1), whose application "to discrimination, prejudices or disadvantage to the traffic of any carrier of whatever description" is now forbidden.

Section 2 does more than merely to forbid "unjust" rate discrimination; it says what it means by unjust—a higher rate or charge made, collected or received, from one person than another for "a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions." (Section 2, 49 U.S.C.A. 2, 24 Stat. 379; 41 Stat. 479.)

The Commission categorically set forth the "dissimilarities" upon which this discrimination is sought to be justified, introducing them as follows:

> "Where, as here, ex-rail and ex-lake proportionals or specifics reflect average (*sic*) circumstances and conditions surrounding the all-rail and lake-rail transportation which differ from those affecting the barge-rail transportation, we conclude that ex-barge proportionals may properly vary from the ex-rail and ex-lake proportionals or specifics to the extent warranted by such differences.
>
> "The principal differences may be summarized as follows:" (R. 32; 195 and following.)
>
> "1. On the average, as compared with the ex-barge grain, the movement under the ex-rail proportionals and specifics requires less terminal service at the gateway or junction, less transit service at intermediate points in official territory, and less line-haul service to the southern portion of central territory."

To understand this statement in the summary of the facts to which it has reference in respect of "less terminal service at the gateway or junction, less transit service at intermediate points in official territory," it is neces-

sary to refer to the earlier finding of the facts thus summarized. Terminal and transit services do not refer to cost of elevation. The finding to which this point of the summary is related is found at 266 I.C.C. 7, 22 (R. 25, 26, 197). It reads as follows:

> "The western factors of the through rail rates include not to exceed three transit services without additional charge, and to the extent that the all-rail shipments receive transit on the in-bound movements to the gateways there is less demand on the eastern carriers to perform transit service thereon. This record shows that there is a very substantial *volume* of domestic grain and grain products moving from points west of the gateways to the East without transit *at the gateways or points east thereof.* That such through movements by rail are substantial is shown by the statistics set forth in appendix B hereto coupled with the fact that official territory consumes as grain or products about 156,000,000 more bushels annually that it produces. Moreover, all-rail grain may be, and frequently is, marketed and processed at Chicago under one transit operation, which avoids the necessity for processing at an intermediate point east thereof. Transit is not available under the inbound barge rates. Barge-rail grain is marketed but not processed at Chicago. To be processed before final destination it must be transited at some point beyond Chicago. It follows that respondents are called upon to perform more transit service, on the average, on the ex-barge than on the ex-rail traffic." (262 I.C.C. 7, 22) (Our emphasis.)

Assuming that the evidence referred to in appendix B warrants the conclusion that the amount of grain moving through Chicago by rail without transit or terminal stop there or east thereof is "substantial," the vice of this is at least threefold:

(a). Assume substantial amounts of ex-rail grain move east without transfer or terminal service at or east of Chicago, what of the volume of ex-rail grain that moves

eastbound from Chicago and does receive full transit and terminal service at the hands of the eastern railroads? The latter is transported under similar circumstances and conditions. To reach out for traffic that is allegedly *not* transported under similar circumstances and conditions, and average it with that which *is*, perverts Section 2, and *a fortiori* Section 3(4).

(b). Still assuming substantial amounts of ex-rail grain move east without transfer or terminal service at or east of Chicago, those amounts when *averaged* (as the report says it does) with the whole of the vast volume moving through Chicago may be, for all the report shows or finds, relatively so small that the average difference relied on is miniscule, not substantial.

(c). The consequence is that "indirectly" (Section 2) ex-rail grain which receives full terminal and transfer service at the hands of the eastern railroads receives a lower charge than ex-barge grain receiving the same terminal and transfer service at the hands of the eastern railroads. This is at least equally offensive to Section 3(4).

(d). The reshipping rate in question is not conditioned in any way upon the amount of terminal or transfer service at or east of Chicago rendered by the eastern railroads. (R. 202.)

(e). Ex-lake grain eastbound from Chicago will be accorded the same reshipping rate as ex-rail grain, lower than the prescribed rates on ex-barge grain.

The Commission finds:

> "Unlike the all-rail traffic the lake-rail traffic following the water courses moves only over circuitous routes, requires transfer of lading and requires a full origin and terminal service when it leaves the interchange port. In other words, it never moves in continuous through transportation." (262 I.C.C. 7, 18, 19; R. 22, 197, 203-204.)

(f). In other respects the finding fails to comply with legal requirements to support the conclusion under either Section 2 or 3(4) and the District Court correctly held that it did not do so.

The remaining circumstance or condition mentioned in Paragraph 1 of the "principal differences" put forward by the Commission is:

> "On the average, as compared with ex-barge grain, the movement under the ex-rail proportionals and specifics required * * * less line-haul service to the southern portion of central territory."

Obviously, line-haul out of Chicago by eastern railroads of grain received by them at Chicago, cannot be affected by how the grain got to Chicago. The reference in the report is believed to be to the fact that some grain that does not come to Chicago at all reaches central territory at a point further south than Chicago.

Nothing in the report discloses the relevance of the "circumstance and condition" last mentioned to the discrimination prescribed against ex-barge grain in reshipping rates from Chicago to New England and trunk line destinations.

The next circumstance or condition mentioned by the report is:

> "The in-bound rail hauls of all the traffic which engages the ex-rail proportionals are substantially longer on the average (*sic*) than the in-bound barge hauls."

The precise character of the discrimination prescribed is discrimination against all connecting barge lines, in favor of all connecting rail lines, in respect of the rate for the eastbound movement from Chicago that each must have to attract inbound traffic to its lines. For example, appellee competes with the Rock Island Railroad for

inbound traffic to Chicago from Illinois producing origins. It is irrelevant to the interest which these sections of the Act are designed to protect, that the Rock Island may enjoy longer inbound hauls from other origins that are not even water-competitive. It has no relevance that the Frisco, for example, may have longer inbound hauls of grain from non-water-competitive origins in the far southwest. Such facts are not relevant to the non-discriminatory relationship prescribed by the statute in respect of the eastbound rate from Chicago on grain for which appellee competes with the western railroads at water-competitive origins.

A carrier with a long haul is not in a favored position in law with respect to the protection of the Act against discrimination when he enters into competition with a carrier whose haul is short.

In respect of their right to protection against discrimination, under Section 2, or Section 3(4), carriers cannot be grouped with reference to the circumstance that their total hauls are long or short, as to the rates accorded their respective traffic for which they compete at the same producing origins, and with respect to which the length of inbound haul is just the same. Such an interpretation of the statute would leave the short haul carrier at the mercy of the long haul carrier with respect to traffic each originates at the same short haul origin west of Chicago.

And surely carriers cannot be grouped *by types* with reference to the circumstances of the *average* length of inbound hauls.

The report then mentions three "rate-making circumstances" said to be "characteristic of the all-rail traffic, but not of the barge-rail traffic here considered." (R. 82, 196.)

The first of these reads:

> "(a) The ex-rail proportionals or specifics, as parts of the through all-rail rates, provide to each destination on all-rail traffic from west of gateways an average out-bound factor which is a component part of many through rates of different amounts, which vary with the length of the in-bound hauls and the western factors applicable thereto." (R. 32, 196.)

This is not difference but identity. The same, in the same words, is precisely true of both the ex-rail and ex-barge reshipping rates.

The next "rate-making circumstance" reads as follows:

> "(b) The ex-rail proportionals or specifics (1) are made subject to a fourth-section rule which in effect provides that to trunk-line and New England territories they shall apply only where the in-bound rate is 8.5 cents or higher, and (2) to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways."

As to the "Fourth Section Rule", referred to also in brief of counsel for the Commission by that description, it reads as quoted in the margin.[6]

This is not the rule of the statute but the rule of certain rail tariffs. The local rate therein referred to is the local rail rate. This rail tariff provision serves to prevent violations of the 4th Section of the statute with respect to all-rail transportation on all-rail routes. To apply that rule to barge arrived grain would effectively destroy the advantage of low cost water transportation of grain into Chicago.

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[6] "In no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rate from the reshipping point to be added to the reshipping rate therefrom."

The 4th Section rule of the rail tariffs is in the rail tariffs to conform *all-rail* transportation (relative to higher all-rail local rates) to the long-and-short haul principle of Section 4. Congress has expressly provided that the long-and-short haul principle as found in the statute shall not apply to require any change in an established rail rate. (Transportation Act of 1940, Section 6(b)). The Commission has taken a rule from railroad tariffs which effectuates the long-and-short haul principle in all rail transportation *in relation to the higher costs of all rail* transportation. The long-and-short haul principle of the statute was negatived by Congress as a reason for the result here reached.

The essence of the question is: Shall the advantage of low cost in-bound water transportation to Chicago end at Chicago (because of the effect of the long-and-short haul principle—as applied to higher cost all-rail transportation) or shall it be preserved at every destination on the barge-rail route?

There is equity in preserving the low cost of water transportation at every destination on the barge-rail route. When Congress by Section 6(b) made that equity a superior one as a matter of law it is not to respect the will of Congress for the agency of Congress to make it inferior—as a matter of equity. The judgment of Congress on the relative equities involved is apparent and is made a specific mandate of the statute.

Examination of the so-called 4th Section rule above quoted will make it evident that the application of the 4th Section provision of tariffs governing all-rail traffic and derived from the 4th Section would make railway costs, as reflected in higher local railway rates eastbound from Chicago, the measure of the advantage to be preserved from the low cost of water transportation into Chicago.

Congress did not intend the high costs of *rail* transportation, as reflected in *local* rail rates, to be the measure of the inherent low cost advantage of water transportation that it directed the Commission to preserve.

It will be recalled that this is here put forward by the report purely as a rate-making circumstance. As a rate-making circumstance it has no equity. *U. S.* v. *Chicago, M. St. P. & R. R. Co.*, 294 U.S. 499, 505.

The invocation of the 4th Section and its long-and-short haul principle, whether it is an application of the statute itself or of the reflection thereof in railway rate tariffs as a justification of a discrimination against the traffic of a connecting water carrier, is precisely a way of discriminating against the traffic of a water carrier because his costs are low. The question is not whether Congress should have left it to the Commission's discretion to do that, which is the burden of the Commission's brief. The question is rather whether Congress did leave it to the discretion of the Commission to do that. We submit that it did not.

This consideration as originally phrased by the Commission consisted of "breaking down" the railroad rate structure and as rephrased in the present report of "jeopardy" to the railroad rate structure. As heretofore pointed out, even the equities which moved the Commission are not strictly 4th Section equities, but equities as to which "elevator companies at rail origins in Illinois" are in "the same relative position" as farmers in central territory east of Chicago. Whatever the merits of such alleged equities, and whether the Commission may seek them or not, they are an invocation of the Commission's views as to "undue preference and prejudice" (Section 3(1)) which may not be here applied under the proviso added to that section by the Transportation Act of 1940.

The report does not proceed on any finding of a lower charge for a longer haul via barge-rail.

The next "rate making circumstance" put forward by the report to justify this discrimination is that mentioned as Item 2 of paragraph 3 (b), (R. 32, 196) and is that the ex-rail proportionals or specifics to all official territory destinations are adjusted to equalize the all-rail rates by the various routes and gateways. Official territory destinations are those lying east of Chicago.

The Commission also says that:

> "Peoria and St. Louis would, of course, be entitled on reasonable request to ex-barge proportionals properly aligned with those approved herein from Chicago, but the record does not contain sufficient detail for the prescription of such proportionals in this proceeding."
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> 262 I. C. C. 732, (R. 36, 210).

It is evident that if the low cost advantage of water transportation on the in-bound route to Chicago is to be reflected east of Chicago in any degree, then there will be produced a situation whereby the lower rated barge-rail route moves traffic at rates less than all-rail rates. The only way to eliminate the "disharmony" is to eliminate the benefits of the low-cost water transportation; to the degree that the low-cost water transportation is destroyed, harmony is restored. That was the essence of the original proposal of the eastern railroads. It will be borne in mind that this is put forward strictly as a rate making circumstance. If any other considerations whatever were involved they are not found. *U. S. v. Chicago, M. & St. P. & P. R. Co.*, 294 U. S. 499, 505. Local rail rates east of Chicago necessarily reflect the higher costs of rail transportation. It will be borne in mind that the ex-rail grain rates east from Chicago are

exactly the same and have been the same for years and were made the same by the eastern railroads to all New England and trunk-line destinations as the rates on ex-barge grain, and that the eastern carriers received exactly the same compensation for the transportation of ex-barge grain that they receive for the transportation of ex-rail or ex-lake grain.[7]

Presumably the Commission would hesitate to harmonize the rate situation by increasing the in-bound water rates, which it finds fair and reasonable, to the level of the in-bound rail rates. (Cf. Alldredge & Lee, dissenting from the report. R. 38). Referring now (in the terminology of the Commission's Brief) to the "water-rail route," the Commission originally effected harmony by permitting the eastern carriers to increase their outbound rail rates on the ex-barge grain to the same level that would have been required under the "4th Section Rule" of the railroad rail tariffs if the in-bound water route had been a rail route. It now permits the outbound rail rate on the ex-barge grain to be somewhat increased—failing to achieve the "harmony" originally aimed at by the eastern railroads—a harmony which can be accomplished only by completely stopping the advantage of the low water cost into Chicago at Chicago—and permitting part, but only part, of that low-cost advantage to be preserved east of Chicago. The high cost of rail transportation, as reflected in local rail rates east of Chicago, is not the measure of the low cost advantage of water transportation that Congress directed the Commission to preserve. The finding does not rationally support the result. Disharmony, with rail rates reflecting higher rail costs (and especially local rates), is bound to be produced by incorporating the low cost of water

[7] (R. 181).

transportation in the national transportation system. If, as and when this should produce consequences which under the standards of the Act the Commission is authorized to minimize or avert, even at the sacrifice of the low cost advantage of water transportation, then a different case would be presented than the one stated in the Commission's report. The thing it has said is that because railroad costs are high, as reflected by local rail costs east of Chicago, therefore the low cost advantage of water transportation must not be fully reflected east of Chicago.

As pointed out by Commissioners Alldredge and Lee dissenting from the report, there is no logical relation of cause and effect in the Commission's order; that its essence is to get more traffic for the western railroads, although that traffic is now attracted to water transportation by water rates which are expressly found to be fair and reasonable. (R. 39, 40).

As to the equalization of routes and gateways, there is no suggestion whatever in the Commission's report of any consideration that would prevent the equalization of barge-rail rates via Chicago with barge-rail rates via other routes and gateways. The equalization of the Chicago gateway with a gateway that lies off the water-rail route merely in order to make the all-rail rates via such other route equal with water-rail rates via Chicago would merely be to sacrifice the low cost advantage of the water transportation on the water-rail route, here put forward as a justification for discrimination against the traffic of in-bound water carriers and purely as a "rate making circumstance"—no other objective being disclosed by the findings. If the fact that rates are lower on barge-rail routes than they are on all-rail routes constitutes a rate making circumstance

supporting the equalization of water-rail routes and gateways with all-rail routes and gateways, what becomes of the inherent advantage of low cost water transportation?

The Commission then points out in paragraph numbered four that lake grain from the northwest consists chiefly of wheat, which has a relatively long water haul in-bound and is usually preceded by an in-bound rail haul, the rail-lake-rail combinations, in general, conforming to the principles which underlie Section 4. (R. 32, 196) Here, again, the Commission is confronted with an Act of Congress which forbids the application effected by the Transportation Act of 1940 of the long-and-short haul principle of Section 4 to water rates, to have the consequence of requiring a change in established rail rates. The Commission does not find that there is at any point a greater charge for a shorter haul on the barge-rail route, nor is there. If the low cost advantage of water transportation is to be preserved then a lower cost via barge-rail than via all-rail is inevitable. Section 4(1)a concededly does not require the result reached (R. 35). As to the "principles" of Section 4 the Commission cannot rightfully apply those principles where Congress has said the section shall not apply; to do so is to depart from the criteria of the Act. It is again to sacrifice the low cost advantage of water transportation, reflected by fair and reasonable water rates into Chicago, when combined with rates of the eastern railroads yielding them exactly the same return that they receive when they transport ex-rail grain originating west of Chicago at the same producing point.

We emphasize that if the proportional rail rates east from Chicago were made to vary according to the length of the in-bound haul from the same origin point west of Chicago, and regardless of whether the transportation

into Chicago was by water or by rail, the situation would then be very different from that which the Commission has created by its order. If the ex-rail and ex-barge rates eastbound from Chicago are the same on grain produced at Morris, Illinois, there is no discrimination against the traffic of the connecting rail and water carriers who bring to Chicago from Morris. If that proportional rate eastbound from Chicago on grain originated at Morris were different than another proportional rate eastbound from Chicago and applying on grain that originates in New Madrid, Missouri, that fact would not constitute a discrimination against the lines of the connecting rail and water carriers who compete for the grain traffic into Chicago from New Madrid—provided the rail rate from Chicago on grain originating at New Madrid were the same regardless of whether it had come to Chicago from Madrid by the line of a barge carrier or by the line of the western railroads. The position here taken is not in the slightest degree inconsistent with proportional rates out of Chicago which vary with the length of the in-bound haul to Chicago. The objective achieved by the Commission's order, however, is to make the proportional or reshipping rate eastbound from Chicago higher on grain that comes in from Morris, Illinois, by barge line than on identical grain coming in from Morris, Illinois, by railroad.

The relevance of any consideration as to whether the grain is wheat or corn to the considerations that produced the order is illustrated by the fact that the higher outbound rate is charged on wheat coming by barge to Chicago from such distant points as Kansas City (on the line of the Inland Waterway Corporation) or St. Louis (on the line of this carrier) and the lower outbound rate is to be charged on wheat from the northwest reaching Chicago by water.

The lower court concluded:

> "The findings of the Commission do not disclose any rational relation between such differences, if any, and the difference in reshipping rate prescribed on ex-barge grain as compared with the established reshipping charges that remain applicable on ex-rail and ex-lake grain and that have hitherto been applicable on ex-barge grain."

We submit the finding was correct.

We submit that the order prescribes rates which are not supported by the findings of the Commission under Section 2 of the Interstate Commerce Act or under Section 3 (4) of the Interstate Commerce Act.

III.

The National Transportation Policy.

The legislative history of the Transportation Act of 1940,[7] and the specific terms of the Act,[8] leave no room to doubt that low cost is the inherent advantage of water transportation, nor any question whatever that the framers of the Act, throughout its provisions, sought to give the Commission a mandate to preserve it.

The Commission on Brief asserts in substance that the extent to which the conceded low-cost advantage of water transportation must be preserved, is a matter of its own exclusive and unreviewable discretion.[9]

That contention raises an issue also under the statutory provisions above referred to giving the courts the duty to review the acts of the Interstate Commerce Commission.

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[7] 319 U. S. on 698.

[8] 319 U. S. on 680, n. 4.

[9] Brief, 31.

When the Commission, in determining the extent to which the low-cost advantage of water transportation shall be destroyed or preserved, by confession,[10] undertakes to assimilate the measure of its delegated discretion under Sections 2 and 3(4), to the broad standards of Section 3(1)—that the Transportation Act of 1940 forbade it to resort to on such an issue—is it the intent of the Urgent Deficiencies Act that this, also, shall be in the exclusive discretion of the Commission? When the Commission resorts to considerations of "undue prejudice between persons and places"[11] as the measure of its delegated authority on the issue of inter-carrier rate discrimination under Sections 2 or 3(4)—as, by curtailing the inherent low cost advantage of water transportation in the interest of elevators at "rail origins in Illinois"—is it the intent of the Urgent Deficiencies Act that that, also, shall be in the Commission's discretion? Is the avowed assimilation of precise and prescribed standards (Sections 2 and 3(4)) to broad and forbidden statutory standards (Section 3(1)) in curtailing the inherent low cost advantage of water transportation, a matter for the uncontrolled discretion of the Commission? When Congress by express enactment in the Transportation Act of 1940 said that the new application of the long-and-short haul principle to water rates (Section 4(1)a) should not require that established rail rates be changed, was it in the discretion of the Commission to say that this meant only that the Commission should not for that reason require them to be changed, but that it was free just as effectively to curtail the low cost advantage of water transportation by permitting them to be changed, in amounts that it prescribed, because the application of the long-and-short

[10] Brief, 20, 48.

[11] Brief, 20, 48.

haul clause to water rates effected by Section 4(1)a required that? Does that not overlook that *it was not that the Commission* was by Section 6(b) forbidden to "require" the increase of established rail rates; rather, it was that *the new application of the long-and-short haul clause to water rates effected by Section 4(1)a* should not require that result—and is not that the result that the Commission has in substance brought about, and precisely because of the application effected by Section 4(1)a of the long-and-short haul clause to water rates, contrary to Section 6(b)? It seems to us that all these questions must be answered unfavorably to the claim of exclusive discretion now asserted and that this Court is called upon to correct errors of law and reject the Commission's order as unsupported by the findings under the applicable statutory criteria.

It would be extraordinary if the National Transportation Policy manifested by the Act and its several specific amendments [12] should be made the means of equalizing the natural economic advantages and opportunities, precisely those that arise from accessibility to low cost water transportation, when that could not be done under any section of the Act prior to enactment of the 1940 amendment, and the amendatory legislation was at such pains to ensure that exactly that natural advantage should be preserved.

We had looked for counsel's discussion on brief of the following statement in the report, which itself is the only discussion of the relation of the result reached to the National Transportation Policy we can find there:

> "The ex-barge traffic cannot be averaged with the ex-rail transportation and accorded the same outbound proportionals if, as the Act requires, the in-

[12] Cf. 319 U. S. on 678, note 4.

herent advantage of each form of transportation is to be preserved, for to do so would not only give full effect to the lower inbound cost but, in addition would extend to the barge-rail transportation very nearly all the advantages of all rail transportation."
(R. 35.)

CONCLUSION.

We submit that the order of the specially constituted District Court should be sustained.

Respectfully submitted,

EDWARD B. HAYES,
for A. L. Mechling, doing business as A. L. Mechling Barge Line, Appellee.

EDWARD B. HAYES,
Of Counsel.

APPENDIX A.

National Transportation Policy
(Title 49 U.S.C.)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Transportation Act of 1940
(Title 49, U.S.C., sec. 4, note)

Sec. 6(b) In the case of a carrier heretofore subject to the provisions of paragraph (1) of section 4 of the Interstate Commerce Act, as amended, no rate, fare, or charge lawfully in effect at the time of the enactment of

this Act shall be required to be changed by reason of the amendments made to such paragraph by subsection (a) of this section. In the case of a carrier not heretofore subject to the provisions of such paragraph, no rate, fare, or charge lawfully in effect at the time of the enactment of this Act shall be required to be changed, by reason of the provisions of such paragraph, as amended by subsection (a) of this section, prior to six months after the enactment of this Act, or in case application for the continuance of any such existing rate, fare, or charge is filed with the Interstate Commerce Commission within such six months period, until the Commission has acted upon such application.

INTERSTATE COMMERCE ACT

(Title 49, U.S.C.)

Sec. 3(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Sec. 4(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included

within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part, or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Sec. 15a(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Sec. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.